

Contesting the ‘we’ of ‘we’: the rights of Indigenous peoples in Australia

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Abstract

Introducing three papers which have as their theme Indigenous and non-Indigenous rights, this paper offers a set of frameworks through which to read the various discourses as they have steered debates since colonialisation. It examines the way Indigenous rights have been contested against a colonial legal framework, first through the guise of assimilation, various definitions of ‘reconciliation’, and self determination, and finally in the claim for land rights in New South Wales. It argues that the philosopher Martin Buber offers a means of achieving rights for everyone, through his I – Thou model of inter-subjectivity.

Charting dialogues beyond neo-conservatism forces us to address the question of rights and, more particularly, the question of ‘whose rights?’ From the earliest days of the Australian colonial invasion, to the current would-be post-colonial dispensation, Indigenous peoples have been subjected to a range of exceptional rights regimes, interventions and special measures. The process of identifying as Australian, defining the national ‘we’, is pursued both with and against a subordinated Indigenous identification, the Indigenous ‘we’. Resistance to domination mobilises Indigenous collective identity; enforcement of domination mobilises national collective identity. Resulting conflicts and accommodations revolve around rights, and who has them.

Rights are never given: they always have to be claimed, through social mobilisation. Shared identification and resulting social solidarity is thus a precondition for the realisation of rights. At the face-to-face level, such solidarities rest on inter-personal dialogue and mutual understanding. The process of mutual recognition that is the basis for respect and trust, enables collective identification and common action. A close parallel can be drawn from the inter-subjective ‘I-Thou’ nexus, posited by the Austrian philosopher, Martin Buber, in the 1920s. Rather than a process of objectification, of ‘I-It’, as Buber characterised it, the ‘I-Thou’ relationship enables a process of mutual subjectification. Through it, social actors claim the subjecthood that, as Alain Touraine (1995) argues, is the precondition for social movements.

The historical process of constructing national identification in Australia, a national 'we', on the basis of subordinated Indigenous rights, sees the 'I-It' relationship writ large. This section addresses challenges to this arrangement that in different ways seek to construct new solidarities, and in Buber's formulation, mobilise 'I-Thou' relationships. A key focus is to identify how much, if at all, the first peoples of Australia have access to the same rights as non-Indigenous Australians. Within an overarching framework of democratic values, one of the central questions addressed in this section concerns the degree to which the Indigenous population's experience is part of an inclusive and participatory 'we', offering an accurate measure of the effectiveness of Australia's post-colonial democracy. This introductory article offers an interpretative frame, centred on the question of identification and the assertion of rights. First there is some discussion of the issues raised in the three papers. Second, these issues are illustrated through a brief survey of Indigenous rights in Australian history, in order to contextualise the accounts to follow.

Three perspectives: international, national, local

Each of the three papers is differently concerned with the positions in which Indigenous peoples of Australia have historically been placed. Specifically, they focus on the extent to which Indigenous peoples now form part of the same decision- and law-making processes as non-Indigenous people. In so doing, they centre on rights regimes, and the relationship between Indigenous rights and national citizen rights.

In normative terms, the articles present arguments for an inclusive symmetry between these rights and identifications, and suggest means of how to get there. Implicit in all three papers is the need for a formal Treaty that sets the framework for mutual recognition, as the basis for a symmetry of rights. The papers necessarily cover a wide range of historical, legal, political and social legacies of colonisation, as a way of addressing the resulting ongoing debates about Indigenous peoples 'rights'.

In the first article, Garth Nettheim outlines an international legal framework out of which Indigenous rights can be established. Here Indigenous sovereignty conditions state sovereignty: Indigenous identification and ownership precedes the state, and thus Indigenous rights claims are *a priori*.

In the second article, Nina Burridge discusses the national-level reconciliation process in Australia. Here, Indigenous sovereignty is subsumed into a transformed state sovereignty so that both Indigenous and national identification undergo a mutual translation.

In the third article, Heidi Norman focuses on the land council movement in New South Wales. She shows how the recognition of land councils offered limited avenues for reclaiming land, but saw Indigenous sovereignty being brought into a legal relationship with state sovereignty, re-embedding national identification.

Each of the papers explores various forms of activism for Indigenous rights, many of which, though by no means all, emerged as a particular discourse over the last forty years. The papers can therefore be situated within a distinct lineage of rights, present from early on in the history of colonisation in Australia.

Rather like an interplay of two voices, the rights discourse emerges, one speaking on behalf of colonisers, the other for resisters. The interplay can be likened to a three-Act play. To date it is possible to say that there have been at least two major Acts. Act One covers invasion and assimilation; in Act Two we see new forms of resistance and accommodation; in the third Act, we see the project of self-determination, albeit in rehearsal.

Against the words of resistance the first 'we' appeals to a notion of assimilation - come and be one of us, be 'whited out'. Do our jobs, though don't expect any pay. Do not complain when Aboriginal women are taken as our playthings. Do not expect any offspring of this play to be of any importance to us. Still, however, the resisting 'we' cannot be silenced. Act two shows that Indigenous resistance is powerful, most especially in shaming the authorities.

In this second Act, the theme of 'reconciliation' emerges. Burridge's paper documents some of the underpinnings of the coloniser 'we' and the way a new movement is formed. So it is that the relationship of a form of activism to social movements becomes apparent, as does the invincibility of coloniser governments, regardless of how much they claim to be promoting Indigenous rights. Burridge addresses the meanings of this version of reconciliation, invoking a sense that there is much more to this story than can be told in these terms.

Norman's paper introduces the first scene of Act Three, from an Indigenous perspective. She finds that in order to realise land rights, this is what must be endured: you can certainly ask to have your land returned to you, but you must abide by all the legislation the colonising authorities have established in order to prevent this. Making progress on a claim will require a number of historians, anthropologists and lawyers to assist. Moreover, it will take a great deal of time. You will be exhausted by the end. You might as well give up now. This story of self-determination is therefore seen through the lens of the struggle to regain land rights in New South Wales.

Against this three-Act backdrop of assimilation, reconciliation and self-determination, is the growing importance of international human rights law, especially the Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007, after twenty-two years of negotiation. The Declaration now occupies what was previously a site of silence, creating new links between local, national and international frameworks for Indigenous rights. As Nettheim argues, it brings signs of hope to a formerly bleak landscape.

Historical and contemporary contexts

Whereas the 'history' of colonisation in Australia is generally rendered in 'mainstream' texts as passive resistance of 'the natives', this represents a gross abuse of the truth of the matter, allowing stories of Indigenous activism to go untold. Such narratives rarely frame accounts of economic, historical, political and social debates. Although not told here, they are available for all to discover. The recent television series, *First Australians*, provides many accounts (Perkins 2008).

To return to the very beginnings of colonisation in this country is to visit some of the silences written into the 'culture wars' and 'history wars' waged by neo-conservative commentators. Under the Howard government these 'wars' became part of an ongoing public debate over the interpretation of the history of the European colonisation, and its impact on Indigenous peoples (ABC 2009a).

The voyage of Captain James Cook, in 1768, had a twofold purpose: to serve both science and the crown. In the first instance, Cook was 'to observe the transit of Venus across the sun, the measurement of which, from several parts of the world simultaneously, would help

astronomers determine the distance between the sun and the earth' (Beaglehole 1955–74, 1:514). .

The other important aspect of Cook's mission was, on behalf of His Majesty, to 'endeavour by all proper means to cultivate a friendship and alliance with [the natives]' (Bennet and Castles 1979: pp 253–54). This and the following point are not well known in 'mainstream' Australia. Cook's instructions were clear: 'You are ... *with the consent of the natives* to take possession of convenient situations in the country in the name of the king of Great Britain, or, if you find the country uninhabited take possession for His Majesty' (Bennett and Castles pp 253–54). On 29 April 1770, the *Endeavour* sailed into Botany Bay. Encountering the local people, Cook later wrote that 'all they seem'd to want was us to be gone' (Beaglehole 1955-1974).

In setting up camp, Cook neither heeded the wishes of the local people nor obtained their consent. While the local people's feelings were registered in Cook's writing, respect for these feelings in no way inhibited settlement. Such settlement would soon relieve the British of many unwanted convicts, and simultaneously allow the greater expansion of Empire.

A point necessarily central to the debate on colonisation, and hence to the three papers in this section, concerns the how and why of Cook's failure both to follow instructions and those precedents established by the British in the United States and Africa. Of this question, Stuart Banner underlines the point that: 'Members of the Royal Society and the government anticipated that if there really was an inhabited continent in the South Pacific, and if it turned out to be suitable for colonising, Britain would buy it from the natives, just like it was buying North America.' The policy of *terra nullius*, as Banner indicates, was not a standard feature of colonial land policy (Banner 2005; see also Reynolds 1987).

In defiance of both orders and precedent, Cook seized the land as if it were uninhabited. Although his model undoubtedly followed earlier forms of colonisation, cultural theorist Patrick Wolfe argues that this represented 'a zero-sum contest over land on which conflicting modes of production could not ultimately coexist' (Wolfe 2001). Thus Wolfe finds it possible to draw the conclusion, through the lens of post-colonialism, that a project of 'elimination' formed a primary object of this form of colonialism. The notion of 'elimination' has never been far from the mind of governments and is implicit in the 'white Australia' policy.

While Wolfe argues that an intentionally racist explicitness emerged in the doctrine of *terra nullius*, Banner views it as a 'second puzzle':(Banner 2005)' in spite of the fact that only a few decades earlier British humanists sought to improve the lives of Indigenous peoples in the Empire, and to abolish slavery, the law of *terra nullius* remained in place.

By the time the English arrived in Australia, many writers had used the connection between agriculture and property to develop a framework for understanding the development of societies. Against the British standards of associating property rights with cultivation of land, Aboriginal people -- hunter-gatherers, to British eyes -- failed to conform to what the colonisers took to be established notions of civilisation. No attempt seems to have been made to understand why Aboriginal people didn't 'cultivate' the land, but lived in relation to it.

Decades of agitation and still no treaty

In the first of the papers in this section, Garth Nettheim writes that 'in Australia, there has been a long history of proposals to establish a consensual basis with the Indigenous peoples for non-Indigenous settlement' (Nettheim, in this Issue). In other words, a consensual treaty, or even a set of treaties could, even at this stage of history, be established between Indigenous peoples and the non-Indigenous population. The question must be asked, however, of how a consensual arrangement can be found, when colonisers have so much to lose, and when they have seemed so unwilling.

Over the long history to which Nettheim refers, various politicians have spoken openly about a treaty. However, no government in power has acted with purpose to see a treaty through to completion. Despite the most convincing of arguments, despite the convictions of constitutional lawyers, and the acknowledgement by a former prime minister (Keating 1992), that the country was 'stolen' from its rightful 'owners', no treaty yet exists. Neither has a committee been established which could arrive at a consensual basis for a treaty.

From time to time, hope is cultivated only to be diminished, if not entirely banished. The aspiration was expressed, for instance, in 2008, when the Catholic parish of St Mary in South Brisbane. together with the Aboriginal people of the area, established a treaty, which they claimed to be legally binding. The Indigenous and non-Indigenous people worked together for twenty years before establishing this treaty. The parish priest argued that the treaty

follows a Papal Bull of the 17th century, which said that no Indigenous person was to be moved from their land. The poet Oodgeroo has written that 'The treaty was celebrated in coroborree in accordance with Aboriginal customary law and written on paper in accordance with non-Aboriginal law (Oodgeroo 2008).

Cycles of repetition

With the major strand of hope that came from the United States civil rights movement, a particular form of activism was inspired in Australia. To publicise the shocking segregation of blacks and whites on buses in the south of the United States, activists began Freedom Rides.

Thus began a series of student political protests in 1961 which took the form of bus trips through the southern states. Student volunteers, both African-American and white, rode in interstate buses into the pro-segregationist south, in order to test a 1960 United States Supreme Court decision (*Boynton v. Virginia*, 364 U.S. 454) which outlawed racial segregation in interstate public facilities, including bus stations. The American Freedom Rides were met with violent protest and hostility, particularly in the state of Alabama. The publicity resulting from the trips led to a stricter enforcement of the earlier Supreme Court decision and increased public awareness of racism in society.

Following this model, on the night of 12 February 1965, thirty university students from Sydney -- Student Action for Aborigines, led by Charles Perkins -- began their own Freedom Ride, taking a bus to a number of country towns of New South Wales where local Aboriginal communities had been campaigning for decades against discrimination and deprivation.

The media intervention by Student Action for Aborigines shocked much of the nation. The students on the Freedom Ride highlighted the living conditions of Aboriginal people, dispossessed, on reserves and missions, or small settlements on the outskirts of towns. Conditions were brutally harsh, with sub-standard 'shanty' housing, with no plumbing, electricity or basic amenities. Moreover, the students found that racism in country towns they visited was both entrenched and widespread. Aboriginal people had no access to cinemas, hotels, cafés and swimming pools, and often suffered prejudice and suspicion as well as verbal and even physical abuse (Burgmann 2003).

The Freedom Ride was crucial in drawing attention to the plight of rural Aboriginal people and in time showed that they could have effective political representation from within their own communities. The Freedom Ride, moreover, hastened the Referendum of 1967.

Referendum

It was the Indigenous activist and writer, Faith Bandler, and the Indigenous poet, Oodgeroo Noonuccal, along with a number of others, who began a highly successful campaign for Commonwealth recognition of Aboriginal citizenship that resulted in the landslide 1967 Australian referendum in support of Aboriginal rights. Citizenship for Aboriginal people at Federal level is therefore only a little more than forty years old. It had taken almost two hundred years to grant citizenship to the owners of the country.

In 1956, Faith Bandler founded the Aboriginal-Australian Fellowship with Pearl Gibbs. In 1957, she helped launch a petition for a Federal referendum to give Aborigines citizenship rights. Between 1962 and 1973, she was an executive member of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders that led the Referendum campaign. Oodgeroo Noonuccal was born Kathleen Jean Mary Ruska, on Minjerribah in the Stradbroke Islands. At a deputation in 1963 to the then prime minister, Sir Robert Menzies, Oodgeroo offered a lesson in the realities of Aboriginal lives. When the Prime Minister offered the deputation a drink, he was startled by her response that he could be gaoled for that gesture in Queensland (Bandler 2001).

The Referendum approved two amendments to the Australian constitution, the first of which involved the removal of a phrase in Section 51 of the Commonwealth Constitution. This stated that the federal government had the power to make laws with respect to 'the people of any race, other than the Aboriginal race in any State, for whom it was deemed necessary to make special laws'. The removal of the provision 'other than the Aboriginal race in any State' gave the Commonwealth government the power to make laws to benefit Aboriginal people, seen by some as a step in increasing the government's ability to provide welfare, empowerment, and access to justice for Aboriginal people (National Museum of Australia 2007).

The second amendment concerned the documenting of the Aboriginal population, removing the provision in the Constitution which said that when calculating the population of the States

and territories for the purpose of allocating seats in parliament and *per capita* Commonwealth grants, Aboriginal people were not to be counted. Such provision had historical origins in preventing Queensland and Western Australia using their large Aboriginal populations to gain extra seats or extra funds from the Commonwealth. Its removal eliminated official or formal distinctions between Aboriginal and non-Aboriginal populations. In spite of this, however, as Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights Commission, stated that ‘our Constitution permits the federal Parliament to enact laws that racially discriminate against Indigenous peoples – and indeed against any other group based on race’ (Calma 2008).

Section 51(26) of the Constitution – the very provision that Charles Perkins and others fought so hard to amend through the 1967 Referendum – enables the Federal Parliament to make special laws for the peoples of a particular race. This has been interpreted by the High Court as meaning any special laws – including ones that are discriminatory. Surely this is a perversion of the intention of the 1967 referendum (Calma 2008).

Although some are tempted to see the development and success of the policies of these years as the work of government, it must in fact be attributed to the assertiveness of Indigenous peoples and the way they worked with their supporters. It must also be remembered that the primary policy shifts were initiated after the 1967 Referendum under a conservative federal government. This is a point underlined by Peter Sutton in his discussion on the way self-determination began to replace integration/assimilation as federal Indigenous affairs policy, under the conservative leadership of William McMahon in 1971 (Sutton 2001, p132).

Twenty years after the Referendum, in September 1987, the then prime minister, Bob Hawke, announced that he hoped that the forthcoming Bicentenary of Federation would bring about an understanding or compact between Aboriginal people and ‘the Australian community’, implying Aboriginal people were not already part of the Australian community. Hawke said he wanted the Australian people to recognise its obligations and to rectify the injustices of two hundred years. Hawke's words indicated to Indigenous peoples that a Treaty was about to be offered.

In June of the following year, at the Barunga Festival in the Northern Territory, Hawke was presented with 'The Barunga Statement', containing the hopes and aspirations of Indigenous peoples at the festival. Hawke responded with the following words:

It's not the word that's important, it's the attitudes of the peoples, attitudes of the non-Aboriginal Australians and of the Aboriginal Australians if there is a sense of reconciliation... whether you say there's a treaty or a compact is not important, but it is important that we do it (Hawke 1987).

Expressing this sentiment, and responding to growing public concern, in August 1987, Hawke announced the formation of a Royal Commission to investigate the causes of deaths of Aboriginal people while held in State and Territory gaols. The Commission examined all deaths in custody in each State and Territory which occurred between 1 January 1980 and 31 May 1989, and the actions taken in respect of each death. The Commission's terms of reference enabled it to take account of social, cultural and legal factors which may have had a bearing on the deaths under investigation, and its Report, delivered in August 1991, carried 399 recommendations. Recommendation 399 stated:

That all political leaders and their parties recognize that reconciliation between Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided (Royal Commission into Aboriginal Deaths in Custody 1991).

With this mandate, in September 1991 the Hawke Government established the Council for Aboriginal Reconciliation, with the objective of promoting 'a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community... fostering of an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage' (Commonwealth of Australia 1991).

The sense of an onward movement of reconciliation necessarily raises a question about whether the political powers were attempting to sidestep a consensual treaty, concealing the reality of the inequality that Indigenous peoples have always suffered and continued to suffer, in spite of a new-found sense of hope. Whether the move was an attempt further to delay the creation of a formal treaty-making process, even the Council's own 'Document of Reconciliation' was finally sidelined by the Federal Government in 2000, despite sizeable mobilisations at the time in favour of reconciliation (discussed in Burrige in this Issue; see Commonwealth of Australia 2000).

The ambivalence was expressed again in December 1992, in a now-famous speech that Prime Minister Paul Keating delivered in Redfern, inner Sydney. Keating began with an acknowledgement. He said:

It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion (Keating 1992).

Having made such an acknowledgement, Keating continued:

It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask - how would I feel if this were done to me? (Keating 1992)

Whilst recognizing that sixteen years have passed since Keating's speech and that any new reading is retrospective, his words recognise culpability while refusing to act upon it. Later in the same speech, Keating went on to speak as if Aboriginal and Torres Strait Islander peoples had already obtained the right of self-determination.

We are beginning to more generally appreciate the depth and the diversity of Aboriginal and Torres Strait Islander cultures. From their music and art and dance we are beginning to recognise how much richer *our* national life and identity will be for the participation of Aboriginal and Torres Strait Islanders. We are beginning to learn what the indigenous people have known for many thousands of years - how to live with our physical environment (Keating 1992).

Having launched into praise of Indigenous culture, Keating then began to describe what non-Indigenous people had learned from the way in which Aboriginal people treated the environment. This lesson, far from being known at that time, still has to be learned. But in saying that 'our' national life is much richer because of the culture of Aboriginal people under colonisation, Keating was issuing a one-sided statement on behalf of the 'other', blatantly denying Indigenous realities.

While Hawke's statement is now over twenty years old, and Keating's speech was delivered sixteen years ago, did either of these speeches make way for change, or did they merely continue a cycle, albeit in a more gentle tone?

Land rights in NSW

One reality of Indigenous life concerns what Indigenous people have to undertake in order to claim title to ancestral lands. Norman's paper in this section addresses the complexities involved in just one State. Her work emphasises how long it took -- over two hundred years - - before it was recognised that Aboriginal people had entitlements to their own land.

Norman shows how the government renewed its efforts to assimilate Aboriginal people in the 1960s, and how this culminated in the revocation of reserve lands. This spurred the land rights movement into action and, in time, the government was pressured to hold an inquiry.

Assimilation was not, of course, new, but had underpinned so many aspects of colonisation. It came in many forms, as the Aboriginal activist, Chika Dixon, described in a radio interview, referring to the function of his non-education in the late 1940s (ABC 2009b). He and the other Aboriginal children at his school were for years kept in 'class three', for the purpose of maintaining illiteracy. Illiterate children, he claimed, were then taken into the labour force to do the tasks no one else was prepared to do

The function of assimilation, ultimately, was to diminish, if not entirely eliminate, an Indigenous population. A dispersed population, separated from family and home, would find it much more difficult to claim ancestral land. Whether this version of assimilation was intended to lead to what Raphael Lemkin (1944) identified as genocide, where the dismantling of the life of Indigenous people was replaced by colonisers, or whether its objective was 'ethnocide', that is, a form of cultural genocide, remains unclear.

It remains largely unknown that Lemkin (1901-1959), a Jewish-Polish jurist, was keenly interested in colonial genocides. He published his now famous text *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, in 1944. Here the term 'genocide', his invention, was first expounded in print.

Horrified by the slaughter of Armenians by the Turks during the first world war, and further outraged by the massacres of Christian Assyrians by Iraqis in 1933, Lemkin at first began to examine such barbaric acts as crimes, writing from the perspective of international law. He presented his work to the Legal Council of the League of Nations at a conference in Madrid

in 1933. However, his proposal to the Council failed and it was not until December 1948 that the United Nations adopted his work on genocide in the Convention and the Prevention and Punishment of the Crime of Genocide.

For Lemkin, genocide has two parts:

... one, destruction of the national pattern of the oppressed group: the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals (Lemkin, 1944).

While this writer takes the view that what has taken place in Australia can correctly be identified as genocide, following Lemkin's terms, there are others who understand the processes of colonisation more as ethnocide. This describes the destruction of a culture of a people, as distinct from the people themselves. Ethnocide also involves a linguicide, acculturation, and so on.

Conclusion

In summary, then, it must be said that there is yet a great deal of work to be done before it will be possible to claim that Indigenous peoples in Australia and the Torres Straits Islands have their rights and can be self-determining. In the struggles that lie ahead, the hope is that the social contract yet, in my view, to be established between Indigenous and non-Indigenous, will be negotiated as between equals, to generate mutual solidarities and identification, with both sides espousing the philosophy of Martin Buber's 'I-Thou' as a model of 'we-ness'. Only on this basis can a treaty between equals be established.

The history of Indigenous resistance offers many instances of mutual solidarity and action, and in this way prefigures the required transformations. At the face-to-face inter-personal level, the movement forged intimate friendships between Aboriginal and non-Aboriginal people who saw rights as a key to tackling long-term discrimination. Such friendships, based on mutual respect and a belief in human rights, not only formed a basis for radical action, but brought about robust debate in the public sphere, including in the academy.

Some of these 'I-Thou' relationships, to use Buber's terminology, gained a powerful symbolic meaning for the wider public sphere, as well as inspiring new forms of social

dialogue and social action. One example is the relationship between the Aboriginal activist, Chika Dixon and Professor Fred Hollows, which made way for the establishment of the Aboriginal Medical Service in Redfern in the early 1970s. Another is the relationship between non-Indigenous poet, Judith Wright, and Oodgeroo Noonuccal, formerly known as Kath Walker, the first Aboriginal poet to be published in Australia.

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